STATE OF MICHIGAN

COURT OF APPEALS

PETER L. OBREMSKEY, Personal Representative of the Estate of JAMES B. RICHMAN, and Guardian of MARGARET ANN RICHMAN, a legally incapacitated person,

Plaintiff/Cross-Defendant-Appellee,

v

ALLEN G. ANDERSON,

Defendant/Third-Party-Appellant.

and

LITTLE ATLANTIC EXPLORATION & DEVELOPMENT CO, LLC,

Defendant/Cross-Plaintiff-Appellant,

and

ROBERT J. CAREY,

Third-Party Defendant-Appellee.

UNPUBLISHED
May 28, 2009

No. 282853
Kalkaska Circuit Court
LC No. 06-009074-CH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendants appeal from a judgment entered by the circuit court following a bench trial on plaintiff's complaint alleging slander of title. We affirm but remand.

This dispute arose out of a failed real estate transaction. Plaintiff is the personal representative of James Richman and the guardian of James' wife. The Richmans owned a forty-acre undeveloped parcel of land in Kalkaska County, upon which there was a producing oil and gas well. Plaintiff hired Jeff Fitch, a realtor in Kalkaska County with Coldwell Banker Schmidt Realtors to list the Richman property. Information regarding the property was faxed to Anderson. Specifically, the documents included the multiple listing service data sheet, a vacant

land disclosure, a certified parcel survey, a tax map, two oil and gas leases, and three check stubs representing royalty payments.[1]

After reviewing this information, on October 20, 2005, Anderson, on behalf of defendant Little Atlantic, faxed to Coldwell Banker a document entitled "Acceptance of Offer" purporting to accept the offer to purchase the property at the listing price of $65,000, for cash and with no contingencies. Later that same day, Hermes faxed to Anderson a proposed purchase agreement, including the statement to fill in the purchase price with his "best offer." Anderson acknowledges receipt of the purchase agreement, but ignored it on the basis that he believed that he had already accepted plaintiff's offer on the property.

Thereafter, Anderson unsuccessfully attempted to arrange a closing on the property. On October 26, Anderson executed and recorded a document entitled "Affidavit of Interest in Real Property" that claimed that Little Atlantic had the right to purchase the property for $65,000 cash based upon Anderson's claimed acceptance of plaintiff's offer. Subsequently, plaintiff's counsel contacted Anderson, requesting that he sign a quitclaim deed, indicating that plaintiff had accepted an offer from a third party to purchase the property for $100,100. Anderson maintained his right to purchase the property.

Plaintiff thereafter filed the instant litigation for slander of title and to quiet title. Defendants counter-claimed, raising a number of claims, as well as bringing a third-party complaint against plaintiff's attorney, Robert Carey. The parties brought cross motions for summary disposition, as a result of which the trial court granted quiet title in favor of plaintiff and dismissed all but one of defendants' claims, which was taken under advisement but ultimately dismissed as well. The only remaining claim, plaintiff's claim for slander of title, proceeded to a bench trial. Following the bench trial, the trial court ruled in favor of plaintiff, awarding slightly over $100,000 in damages. Defendants then took this appeal.

Defendants first argue that the trial court erred in granting summary disposition in favor of plaintiff on the quiet title claim. We disagree. A motion under MCR 2.116(C)(10) tests the factual support for a claim and is subject to de novo review. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In considering a motion under MCR 2.116(C)(10), the affidavits, depositions, admissions, pleadings and other documentary evidence is considered in the light most favorable to the non-moving party and the motion should be granted if that evidence does not establish a genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Smith, supra*.

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[1] The parties dispute the exact nature of the faxing of the information. Plaintiff maintains that an agent in the Coldwell Banker office, Phyllis Hermes, had faxed the information to Anderson on October 19, 2005, along with a cover sheet that stated that "all offers have to be in by Fri 21st before noon" if Anderson was interesting in purchasing the property. Anderson claims never to have received that fax and requested the next day that Fitch send the information, which he did. At trial, however, Anderson did acknowledge seeing the Hermes fax the next day (October 20), apparently after he had sent the "acceptance," but before filing the Affidavit of Interest.

At issue in the case at bar is whether a legally binding contract was formed. Defendants argue that the documents sent to Anderson constituted a valid offer and that his response sent back to Fitch constituted a valid acceptance of that offer, thus creating an enforceable contract. Plaintiff, on the other hand, argues that there was no offer made to Anderson, and that even if the faxed information constituted an offer, there was no written agreement that satisfies the statute of frauds. We agree with plaintiff.

This case is controlled by our decision in *Eerdmans v Maki*, 226 Mich App 360; 573 NW2d 329 (1997). In *Eerdmans*, the plaintiff saw an advertisement for the sale of land in the local paper. After viewing the land, he contacted the listing real estate agent, the defendant Clint Maki. After discussing the matter with Maki, the plaintiff executed two "Buy and Sell Agreements." The first was for a cash purchase at the listing price and the second, for a higher purchase price on land contract terms. The owners of the property did not sign either of the agreements, instead selling the property to a third party for a substantially higher price. The plaintiff brought an action alleging breach of contract and fraud or misrepresentation. The trial court granted summary disposition in favor of defendants. *Id.* at 362-363. This Court affirmed.

The plaintiff in *Eerdmans* alleged that the combination of the newspaper advertisement, the real estate agent's oral representations, and the listing agreement constituted an offer to sell the property at the listing price and that plaintiff had accepted the offer when he agreed in the "Buy and Sell Agreement" to purchase the property for cash at the listing price. *Id.* at 364. This Court disagreed. The Court's summary of the principles involved is equally applicable here. Specifically, the Court stated:

> A valid contract requires mutual assent on all essential terms. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. *Id.* at 549. Before a contract can be completed, there must be an offer and acceptance. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement Contracts, 2d, § 24; see also *Cheydleur v Hills*, 415 F Supp 451, 453 (ED Mich, 1976). [*Eerdmans, supra* at 364.]

This Court rejected the argument that the newspaper advertisement constituted an offer because the ad did not contain a promise to sell the property and, therefore, it did not give the plaintiff the power to accept. The Court also rejected the argument that the listing agreement constituted an offer because (1) there was no indication that the plaintiff had ever seen the listing agreement and (2) the agreement was between the seller and Maki and it "did not manifest a willingness on the part of [the seller] to enter into a bargain with plaintiff. See Restatement Contracts, 2d, § 24." *Eerdmans, supra* at 365.

In the case at bar, none of the documents sent to Anderson can be regarded as an offer, either considered separately or collectively. The oil and gas leases and the check stubs from the royalty payments had nothing to do with the sale of the property other than to provide relevant information that a potential purchaser might want to consider in making his decision. While the disclosure statement is more directly related to the sale of the property, it too ultimate merely

provides information that a potential purchaser might wish to consider in evaluating the property. It does not itself contain a promise to sell the property. Likewise, the map and survey do not contain any language that could reasonably be construed as an offer for the sale of the property. This leaves the MLS data sheet. Like the listing agreement in *Eerdmans*, the data sheet in the case at bar does not manifest a willingness to enter into a sale with defendants. Indeed, the data sheet is more analogous to the newspaper advertisement—it did not constitute an offer, but was merely an announcement that property was available for sale.

Moreover, plaintiff raises a valid argument that any "offer" came from Fitch and Fitch lacked the authority to make an offer. As also discussed in *Eerdmans, supra* at 364, a listing agreement between a seller and a real estate agent does not create an offer. Further, the only evidence offered by defendants that Fitch had the authority to make a valid offer on behalf of plaintiff is the statement on the MLS data sheet that Fitch had the "exclusive right to sell." This statement is inadequate to establish Fitch's authority. Indeed, the data sheet as a whole is inadequate to establish the agent's authority. Even apparent authority must be traced back to the actions or representations of the principal. See Restatement Agency, 3d, § 3.03. The MLS data sheet reflects the actions or representations of the "agent," not the principal. See also *Eerdmans, supra* at 365 (listing agreement gave the listing agent the authority to arrange a sale, but not to act on behalf of the seller).

This latter point leads to another argument by plaintiff that defendants cannot overcome: there is no written agreement that satisfies the statute of frauds. And, therefore, there is no enforceable contract. MCL 566.108 requires that all agreements for the sale of land be in writing signed by the seller or "by some person thereunto by him lawfully authorized in writing". See also, *Eerdmans, supra* at 365. In the case at bar, defendants point us to no document signed by plaintiff agreeing to sell the property to defendants nor to any document signed by plaintiff that authorizes Fitch to sell the property. Accordingly, even if we treat the documents sent to defendant Anderson as an offer, there was no enforceable agreement for the sale under the statute of frauds absent a writing signed by plaintiff either agreeing to the sale or authorizing Fitch to agree to a sale on plaintiff's behalf. And defendants have produced no such document.

For the above reasons, we conclude that there was no enforceable agreement to sell the property to defendants and, therefore, summary disposition was properly granted on the quiet title claim.

Next, defendants argue that the trial court erred in ruling on plaintiff's behalf on the slander of title claim by concluding that there was implied malice when Michigan law requires express malice to establish such a claim. We disagree.

As the Supreme Court observed in *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 683; 719 NW2d 1 (2006), " 'malice' has acquired *several* peculiar meanings, depending on the context in which it is used." And, thus, the task of a court "is to discern which peculiar meaning of 'malice' is the most appropriate" for the case at hand. *Id*.

In undertaking that task here, we begin by noting two holdings of the trial court in this case in its opinion following the bench trial. First, the trial court concluded that plaintiff had made a showing of "implied malice," but not "express malice." And, second, statutory slander of title, MCL 565.108, requires a showing of "express malice," while common law slander of

title could be established under either "express malice" or "implied malice." Because plaintiff does not appeal from the trial court's decision, we will assume, without deciding, that statutory slander of title does require a showing of express malice and that plaintiff has not established express malice. Furthermore, like the trial court, in this opinion we shall utilize the definitions of "express malice" and "implied malice" set forth by the Supreme Court in *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). Specifically, "express malice" involves "a desire or intention to injure" while "implied malice" is "a wrongful act done intentionally without just cause or excuse." *Id.*

Defendants first argue that common-law slander of title requires a showing of express malice. The trial court relied on the Supreme Court's decision in *Harrison v Howe*, 109 Mich 476; 67 NW 527 (1896), noting that defendants conceded at trial that this was the controlling opinion. We agree that *Harrison* controls on this point. In defining "malice," the Court in *Harrison, supra* at 479, quoted the following passage from Newell on Defamation, 206:

> "The mere fact that a person asserts a claim to the property which is unfounded does not warrant a presumption of malice. Malice must be proved as a substantive fact. * * * So it is not actionable for any man to assert his own rights at any time; and, even where the defendant fails to prove such right on investigation, still if, at the time he spoke, he supposed in good faith such right to exist, no action lies. Hence, whenever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right; he must also give evidence of express malice; that is, *he must also attempt to show that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause for so believing.* If there appear no reasonable or probable cause for his claim of title, still the jury are not bound to find malice. The defendant may have acted stupidly, yet from an innocent motive." [Emphasis added.]

Plaintiff relies on *Glieberman, supra*, for the proposition that *Harrison* requires a showing of express malice. But *Glieberman* reaches that point by only partially quoting the above passage from Newell. More to the point, we believe that the definitions for "express malice" and "implied malice" utilized in *Glieberman* differ from how the term "express malice" was used in Newell and *Harrison*. While the Newell passage does use the term "express malice," it clearly includes in that definition the concept that the party "could not honestly have believed in the existence of the right he claimed" as well as the concept that the party "had no reasonable or probable cause for so believing." This would seem to comport with the definition utilized by *Glieberman, supra* at 12, that "implied malice" means "a wrongful act done intentionally without just cause or excuse."

In any event, what is ultimately relevant is not the label affixed, but the substance of the term in the context in which it is utilized. See *Feyz, supra*. And it is clear from the discussion in *Harrison* that the malice required to establish a common-law slander of title claim includes not only asserting a claim to property that the defendant knows he does not possess with the intent to do the plaintiff harm, but it also includes asserting a claim to property that the defendant cannot honestly or reasonably believe exists. Whether this is labeled "express malice" or "implied malice" is of no consequence. What is of consequence is that this is the standard applied by the trial court and the trial court found the requisite malice to exist.

Defendants also argue that common-law slander of title no longer exists, having been abrogated by the statute. This Court in *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998), however, recognized that "slander of title claims have both a common-law and statutory basis." We see no reason to disagree with *B & B* and hold that common-law slander of title has not been abrogated by statute and remains a viable cause of action.

Defendants next argue that "implied malice" is an unconstitutional standard. Defendants argue that slander of title is a defamation action and that defamation requires a showing of express or actual malice. First, defendants' argument that slander of title is just a form of defamation that must follow constitutional principles that relate to defamation actions is weak at best. Defendants rely on our decision in *Bonner v Chicago Title Ins Co*, 194 Mich App 462; 487 NW2d 807 (1992). That case, however, did not deal with constitutional issues, but which period of limitations to apply, concluding the same period of limitation should be applied to slander of title claims as was applied to ordinary defamation claims. *Id.* at 470. But moreover, defendants' argument is based upon a false presumption, namely that all defamation actions require a showing of express or actual malice. Rather, actual malice is required where the plaintiff is a public figure. *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995). Where the plaintiff is a private figure, only a showing of negligence is required. *Id.*

Defendants' only argument that plaintiff constitutes a public figure is a bold statement that plaintiff is a "limited-purpose public figure" with a reference to *Ireland v Edwards*, 230 Mich App 607, 615; 584 NW2d 632 (1998). Not only are the underlying facts in *Ireland* completely different from the case at bar, but the parties in *Ireland* had agreed that the plaintiff was a limited-purpose public figure. *Id*. at 615. In short, we see not basis for classifying plaintiff as a public figure, limited or otherwise, nor do defendants supply such a reason.

Defendants also argue that, because the Affidavit of Interest was based upon "opinion and belief" it comes within the First Amendment's protection of opinions and, thus, requiring a showing of actual malice. While it is true that expression of opinion does enjoy a First Amendment protection even where the plaintiff is a private figure, *Lakeshore Comm Hosp, supra* at 402, that principle does not assist defendants here. First, it is necessary that those statements of opinion "reasonably cannot be interpreted as stating actual facts about an individual . . . ." *Id.* In the case at bar, the only statement in the Affidavit of Interest which is preceded by the disclaimer "opinion and belief" is this one: "The undersigned [Anderson on behalf of Little Atlantic] is of the opinion and belief that it is legally entitled to acquire the above described real estate for $65,000 cash at closing in exchange for marketable title pursuant to the terms and conditions of the Listing Agreement between the Seller and the above referenced to said exclusive real estate agent and/or agency and upon which and/or the authority of which the undersigned relied." We believe that this statement can reasonably be interpreted as stating an actual fact. That is, despite invoking "opinion and belief," Anderson was clearly making a factual assertion that it had a binding agreement for the sale of the real estate.

Second, even if the above statement is regarded as an opinion worthy of First Amendment protection,[2] elsewhere in the affidavit, two statements of fact are made without qualification. In the first numbered paragraph, it is asserted that the package of documents faxed to Anderson "constitute an offer to sell the entirety of the real estate . . ." and in paragraph three that "the undersigned accepted the above said offer by telefax notification to Seller's said authorized and appointed agent and tendered the cash payment as set forth in Exhibit B, which is attached hereto and incorporated here by this reference." Moreover, in paragraph five, it is asserted that defendants had requested "confirmation of the date and time of closing" as well as the identity of the title company which would handle the exchange of funds for the deed. These statements clearly are statements of fact, not opinion, and which assert a legal interest in the property.

For these reasons, any argument based upon a constitutionally protected statement of opinion requiring actual malice rather than an unprotected statement of fact that requires a showing of less than actual malice is without merit.

Defendants next argue that that the trial court erred in concluding that they acted with implied malice. We disagree. The trial court's opinion includes several pages of findings, which are summarized in its conclusion as follows:

> Although it is difficult to determine a person's subjective intent, the evidence and testimony presented at trial, given the proper weight, convince this Court that Anderson could not have reasonably and honestly believed that his acceptance of Fitch's fax created a binding contract. Fitch expressly told Anderson that there were already offers on the property, and the [sic—that?] he didn't know how he could close the deal that day. Anderson, rather than simply contacting Fitch, then proceeded to take Fitch's fax to Petterson for an opinion on whether the fax was an offer. Anderson's justification for these acts are merely Fitch's scribbled first name on the fax coversheet and the ambiguous phrase "Listing Agreement Type: Exclusive Right to Sell" on the MLS sheet. Given Anderson's past experience with real estate, he could not have reasonably and honestly believed the fax was an offer that, if accepted, would form a binding contract.
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> After sending his acceptance, Anderson saw Hermes' fax requesting offers on the property and saw that it was otherwise identical to Fitch's fax. Yet he proceeded to demand a closing date from Coldwell, threaten litigation, filed an Affidavit of Interest on the property in a clear effort to prevent any other closings, and wait. He failed to take any action to enforce his alleged contract until Plaintiff's [sic] filed this action months later. These acts convince this Court that Anderson was hoping to pressure Coldwell and Obremskey into selling the

[2] Although we decline to address the matter, we would note that whether this is the opinion that is worthy of First Amendment protection is questionable at best.

> property at a reduced price, rather than reasonably and honestly believing his acceptance formed a valid contract.
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> This Court therefore concludes that Anderson filed the Affidavit of Interest intentionally, wrongfully, and without a reasonable or honest belief of its validity. This amounts to implied malice.

We review the trial court's findings of fact in a bench trial for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Defendants pose a number of arguments that there was no malice established, none of which are persuasive. First, defendants argue that no witness testified that Anderson intended to injure plaintiff. But, as discussed above, while that is required for a showing of express malice, it is not required for a showing of implied malice. Defendants also look to *Harrison*, *supra* at 479, for support, in particular quoting the passages that suggest that an assertion of a claim that proves to be unfounded and that having "acted stupidly," yet with an innocent motive, does not establish malice. But defendants overlook the fact that *Harrison*, *supra*, also makes it clear that malice in a slander of title action may be established by a showing that the defendant could not have honestly or reasonably believed their claim to be valid. It is on this basis that the trial court held defendants liable and we do not believe that the trial court clearly erred in finding malice to exist on this basis.

We need not repeat the trial court's extensive factual findings here. But we do find two key points especially compelling. First, as discussed above, we conclude that there was no reasonable basis to believe that the documents faxed to Anderson in any way constituted an "offer" which could be accepted. Therefore, defendants had no reasonable basis to believe that there had been a valid offer and acceptance that would justify the filing of the Affidavit of Interest. Second, although Anderson denied initially seeing the fax from Hermes, with the cover sheet that clearly was soliciting offers, not making an offer, he admitted at trial that he did see it the following day. Thus, before the filing of the Affidavit of Interest, he clearly knew that plaintiff did not understand the documents sent to Anderson to constitute an offer.[3]

Defendants also argue that there can be no malice because Anderson acted on the advice of counsel in filing the Affidavit of Interest. See *Slater v Walter*, 148 Mich 650, 655; 112 NW 682 (1907). We disagree. First, defendants read too much into *Slater*. Defendants argue that there cannot be malice if a party acted under the advice of counsel. We do not read *Slater* as being quite so absolute. That is, it is clear under *Slater* that acting under the advice of counsel is a strong and relevant factor, but not a conclusive factor. Second, *Slater* makes it clear that advice of counsel defense applies where the defendant has no knowledge of the law. *Id.* In the

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[3] For that matter, Anderson also received, after sending the acceptance but before filing the Affidavit of Interest, a proposed "Buy and Sell Agreement" with the request to fill in his "best offer," which further reflected plaintiff's understanding to be that it was soliciting offers to purchase, not making an offer to sell.

case at bar, defendant Anderson is an attorney himself.[4] And, third, the attorney rendering the advice can have no personal interest in the subject matter upon which he is providing his advice, nor can there be some other reason known to the client that would reveal that the attorney providing the advice is not completely disinterested. *Id.*; see also *Adkin v Pillen*, 136 Mich 682, 686; 100 NW 176 (1904). In the case at bar, while it does not appear that attorney Petterson had a personal stake in the real estate transaction at issue, he is a member of the same law firm as defendant Anderson and, thus, does not represent a completely disinterested person. Indeed, the trial court found that Anderson's consultation with Petterson was not for the basis of determining whether there had been an offer that could be accepted, but to determine if there was a way in which the documents faxed to Anderson could be construed to be an offer that could be accepted. In short, we do not accept the argument that defendants can be cleansed of malice merely because Anderson consulted with another attorney in his firm before proceeding.

Finally, defendants argue that plaintiff and his agents perpetrated fraud in the transaction and such fraud vitiates any malice by defendants. We disagree. Contrary to defendants assertion on appeal, *Dauod v De Leau*, 455 Mich 181, 194; 565 NW2d 639 (1997), does not stand for the proposition that fraud vitiates everything it touches. Rather, *Dauod* stands for the more modest proposition that fraud in litigation may, in some (but not all) circumstances vitiate the judgment rendered in the case as a result of the fraud.[5] Indeed, the fraud claimed by defendants has little to do with this matter. In their brief on appeal, defendants claim four instances of fraud by plaintiff: (1) the failure to disclose that the property was landlocked, (2) the broker never signed the listing agreement, (3) the estate could not convey title at the time of listing, and (4) plaintiff never intended to sell the property for the listing price. We fail to see how the second and fourth items could even be considered fraud. The third item could be fraud only if it was represented that plaintiff was selling the entire interest (and not just his own partial interest, or the partial interest that he had the authority to sell) and then only if he purported to convey the entire interest at closing when, in fact, he could not convey the entire interest. While the first item could potentially constitute fraud, it would be material only if an actual agreement to sell the property to defendants had been reached.

For the above reasons, as well as the other reasons set forth in the trial court's opinion, we do not believe that the trial court clearly erred in finding that defendants acted with malice.

Defendants next argue that the trial court erred in the amount of the award of damages for attorney fees and costs. We disagree. The costs incurred in removing a cloud from the title are an element of damages recoverable in a slander of title action. *GKC Michigan Theaters, Inc v Grand Mall*, 222 Mich App 294, 301; 564 NW2d 117 (1997). We review a trial court's findings on damages under the clearly erroneous standard, like any other finding of fact. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

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[4] And apparently experienced in real estate transactions even if not a real estate attorney.

[5] We should also point out that we are not endorsing the view that plaintiff or his agents actually committed any fraud.

The parties appear to agree that the amount of attorney fees that were awardable is the reasonable amount. We begin by noting that we do not necessarily agree that the trial court was limited to awarding a reasonable attorney fee rather than the actual attorney fee. The cases cited by the parties all deal with situations where a party was entitled to a reasonable attorney fee and the court was faced with determining what was a reasonable fee in the case.[6] It would seem to us that, where attorney fees incurred are an element of damages, the appropriate award is the actual attorney fees incurred, at least in the absence of a showing of fraud or collusion or the like. But, we need not make that determination because plaintiff does not raise that argument.

With respect to defendants' argument that the trial court's award is unjustified, while defendants make that assertion, they present no real argument why the award was excessive beyond a general argument that the delay in closing was not entirely due to defendants' slander of title. Defendants rely on *GKC Michigan Theaters, supra* at 305, for the proposition that the fact finder must assess whether the defendant's actions were a substantial factor in delaying the closing. Defendants misread *GKC*. That portion of the opinion related to a determination whether there was causation in a slander of title action. Whether the slander of title caused a delay in closing would perhaps be relevant to determining whether a damage incurred as result of the delay was recoverable in the slander of title action. That is, for example, if a seller incurred an additional $10,000 in expenses due to the delay in a closing, perhaps because of additional mortgage interest or property taxes, and the closing would have been delayed despite the slander of title, then it could perhaps be said that the $10,000 was not an injury caused by the slander of title.

But defendants concede that the damages were "primarily in form of attorney fees." And the only aspect of the damage award that defendants specifically object to is the attorney fees. Moreover, as noted above, the expenses incurred in litigation to clear a cloud on title are recoverable as damages in a slander of title action. *GKC Michigan Theaters, supra* at 301. In other words, even though closing may have been delayed due to other reasons as well as the cloud on the title caused by defendants' slander of title, that cloud on the title ultimately had to be cleared. And the expenses incurred, including the attorney fees, to clear the title represent damages recoverable by plaintiff, which are independent of whether the closing would have been delayed anyway.

For these reasons, we conclude that the trial court did not clearly err in its award of damages.

Defendants next argue that the trial court erred in dismissing their claims under the consumer protection act and the pricing and advertising of consumer items act. We disagree. The Michigan Consumer Protection Act, MCL 445.901 *et seq.*, is inapplicable here because

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[6] Plaintiff cites *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982) (where MCL 500.3148 specifically provides for the award of a reasonable attorney fee), and *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681; 713 NW2d 814 (2006) (a statutory award of reasonable attorney fees under MCL 559.206). Defendants refer to *Crawley v Schick*, 48 Mich App 728; 211 NW2d 217 (1973) (determination of a reasonable attorney fee in a wrongful death action).

Little Atlantic was the purported purchaser and "the MCPA applies only to purchases by consumers and does not apply to purchases that are primarily for business purposes." *Slobin v Henry Ford Health Care*, 469 Mich 211, 216; 666 NW2d 632 (2003). Accordingly, the trial court properly dismissed the MCPA claim.

As for defendants' claim under the Michigan Pricing and Advertising of Consumer Items Act, MCL 445.351 *et seq.*, the only "advertising" that defendants claim was in violation of the MPAA is the materials distributed by Coldwell Banker and its agents. Neither Coldwell Banker nor any of its agents are parties to this litigation. Accordingly, even if defendants can make out a claim under the MPAA, it is not against plaintiff or the third-party defendant. Therefore, this claim was properly dismissed as well.

Defendants next argue that the trial court erred in denying their motion to amend the pleadings to conform to the proofs. Specifically, they requested the reinstatement of the MCPA and MPAA claims. However, the deficiencies noted above were not cured by the proofs presented at trial. That is, Little Atlantic remained a business and Coldwell Banker remained a non-party. Therefore, the trial court did not err in denying the motion to amend.

Next, defendants argue that the trial court erred in setting aside the default against the third-party defendant for failing to answer defendants' amended third-party complaint. In essence, the trial court ruled that an answer was not required because leave to amend the complaint had never been granted. The trial court was correct, if leave to amend had not been granted, an answer was not required.

This leads to defendants' rather brief argument that the trial court abused its discretion because MCR 2.116(I)(5) requires that a party be given an opportunity to amend their pleadings unless the amendment would not be justified. The trial court ruled in essence that because there was no offer and acceptance, as a matter of law no contract existed and, therefore, no amount of discovery could change that fact. Indeed, defendants in their brief point to no change to the pleadings that would show that they could amend their pleadings in a manner that would have avoided summary disposition.

Defendants' final argument is that the trial court erred in granting summary disposition on their claim against the third-party defendant for malicious prosecution. An essential element of a malicious prosecution case is that a prior proceeding has terminated in the prior defendant's favor. *Peisner v Detroit Free Press, Inc*, 68 Mich App 360, 367-368; 242 NW2d 775 (1976). Therefore, defendants' claim for malicious prosecution was premature because it was brought as part of the pending action, not after it. *Id.* Furthermore, ultimately the "prior proceeding" (i.e., the case at bar) terminated in favor of plaintiff, so there would be no basis to bring a malicious prosecution action by defendants after the "prior proceeding" concluded. Therefore, the trial court properly dismissed the malicious prosecution case as well.

This, then, brings us to the sole issue raised by plaintiff and third-party defendant, that they are entitled to costs and fees based upon a frivolous and vexatious appeal. We agree. There was no basis in the law to reasonably or honestly believe that plaintiff had made an offer to defendants to sell the property. As the trial court concluded in its opinion, defendant Anderson's actions after receiving the faxed documents amounted to "investigating whether the documents could be *construed* as an offer." We also agree with the trial court's conclusion that defendant

Anderson's behavior after sending the "acceptance" did not reflect that he had "a reasonable honest belief that his contract was enforceable," but that it was "a tactic aimed at pressuring Coldwell and Obremskey into closing on the property."

The decision of the trial court is affirmed. The matter is remanded for a determination of fees and costs for a vexatious appeal under MCR 7.216(C). We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens